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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL RAMIREZ,

Defendant and Appellant.

D074554

(Super. Ct. No. SCD274716)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed and remanded for resentencing.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Kristen Ramirez, Deputy Attorneys General for Plaintiff and Respondent.

After they had been drinking in a bar, Miguel Ramirez and Enrique F. argued briefly outside. Ramirez kicked Enrique in the chest, causing severe injury. A jury

convicted Ramirez of assault by means likely to produce great bodily injury and battery resulting in the infliction of great bodily injury, and found true the allegations that Ramirez personally inflicted great bodily injury. The trial court sentenced Ramirez to 14 years in state prison.

Ramirez's sentence included a five-year term applicable to defendants who have suffered a prior serious felony conviction pursuant to Penal Code section 667, subdivision (a)(1).¹ Ramirez now contends he is entitled to remand for resentencing to allow the trial court to exercise its new discretion to strike the formerly mandatory five-year enhancement. (§§ 667, subd. (a)(1), 1385, as amended by Stats. 2018, ch. 1013, §§ 1-2.) The Attorney General concedes the amendment at issue applies retroactively but contends remand is not warranted here because the trial court denied Ramirez's *Romero* motion² and made certain statements at sentencing, which indicate the trial court would not have dismissed the enhancement even if it had the power to do so at the time of sentencing. We conclude the record below does not clearly indicate whether the trial court would have stricken the five-year prior serious felony enhancement; thus Ramirez is entitled to resentencing to allow the trial court to exercise its new discretion to strike or impose the enhancement. In all other respects, the judgment is affirmed.

¹ Further statutory references are to the Penal Code unless otherwise specified.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

BACKGROUND

After a night of drinking and playing pool in a bar, Enrique passed out in a planter outside. A group of friends leaving the bar observed Enrique asleep in the planter. Concerned for his safety, the friends awoke him and attempted to speak with him, but Enrique was speaking slurred Spanish they did not understand. The friends decided to enlist Ramirez's help because they had seen Ramirez and Enrique playing pool earlier and overheard them speaking fluent Spanish. Ramirez, who had also been drinking that night, came outside and began arguing with Enrique. A witness saw Ramirez begin to walk away, but then he turned around, took a running start, and "jump kicked" Enrique, striking him in the chest. Enrique fell and struck his head. He was unresponsive and blood began seeping from his mouth. Ramirez fled the scene and was several blocks away when police later apprehended him. Enrique was taken to a hospital, where he remained for several weeks. He ultimately underwent surgery to repair his skull.

An information charged Ramirez with assault by means likely to produce great bodily injury (§§ 245, subd. (a)(4), 12022.7, subd. (a); count 1) and battery resulting in the infliction of serious bodily injury (§ 243, subd. (d); count 2). The information alleged as to each count that Ramirez personally inflicted great bodily injury during the commission of the offenses (§ 1192.7, subd. (c)(8)). The information further alleged Ramirez suffered two prior probation denials (§ 1203, subd. (e)(4)), one serious felony

prior (§§ 667, subd. (a)(1), 1192.7, subd. (c)), and one strike prior (§§ 667, subds. (b)-(i), 1170.12, 668).³

At trial, Ramirez testified he did not know Enrique but had seen him around previously. The night of the incident, Ramirez intervened when he noticed Enrique, who was apparently intoxicated, aggressively approach a woman at the bar. Ramirez did not remember playing pool with Enrique that night. Ramirez went outside the bar when someone told him Enrique was " 'acting like a fool outside.' " Ramirez and Enrique exchanged words before Enrique took steps toward him. Ramirez testified he thought Enrique was "coming up to attack [him]" and "reacted." He kicked him in the chest. He stated he was "sad" and "remorseful," and he never intended to cause Enrique's injuries when he kicked him.

A jury convicted Ramirez on all counts and found true the allegation he personally inflicted great bodily injury during the commission of the offenses.

Ramirez admitted the prior allegations and moved to strike the prior strike offense pursuant to *Romero*. The trial court denied the motion:

"At the time *Romero* was decided, we had a very different three strikes law. . . . You could get 25 years to life in prison on a petty theft with a prior if it was—if he had two prior strikes. . . . And the Supreme Court said judges have the ability and the discretion to reduce strikes because this does fall outside the spirit of the three strikes law, which is not designed to put people who commit a petty theft or a possession for drugs in prison for 25 years to life. And so

³ The serious felony prior and the strike prior were predicated on the same offense: Ramirez's 2004 conviction for assault with a deadly weapon, committed in association with a criminal street gang (§§ 245, subd. (a)(1), 186.22, subd. (b)(1)).

you can strike a strike or you can strike two strikes as the case might be because the case screams for probation.

"I don't think *Romero* was designed for and certainly doesn't show my kind of interpretation of *Romero*, where one will be striking the prior strike in a situation where the new crime is itself a strike. And not only is the new crime itself a strike in this case, the new crime is a strike that had devastating consequences. And to strike a strike in this particular case for this particular crime, I think, falls well outside of the spirit of the three strikes law. The *Romero* motion is denied."

At the sentencing hearing, the victim made a statement indicating he had undergone surgery to repair his skull after the trial, but he continued to suffer seizures and cognitive dysfunction.

The trial court observed that the probation report recommended imposing the lower term despite stating no circumstances in mitigation and five different circumstances in aggravation. The trial court noted circumstances in aggravation included that the victim, who was "about half the size of Mr. Ramirez" and extremely intoxicated, was "very vulnerable" at the time of the crime, and that "[t]here was violent conduct involved here" which "indicates a serious danger to society." The court further observed that Ramirez "fled the scene" and previously demonstrated unsatisfactory performance on probation and parole. The court characterized Ramirez's conduct in the crime as "serious" and "callous," and noted that the result of his crime was "devastating," as the victim spent three weeks in the hospital and suffered cognitive dysfunction as a result of his injuries. The court stated that "certainly by the analysis that I have engaged in, I would be well within my rights to sentence him to an upper term and I'm not going

to do that. I don't think that the upper term is necessary, but the lower term is not deserved."

With respect to the allegations, the trial court stated:

"The requirement of the Penal Code section [12022.7, subdivision] (a) allegation, that is . . . three years mandatory consecutive. And then because this is a serious felony prior and it was a nickel prior that was alleged and found true, that is an additional five years."

The trial court sentenced Ramirez to state prison for a total term of 14 years, consisting of the middle term of three years on count 1, doubled to six years due to the prior strike, plus three years for the great bodily injury enhancement, plus five years for the prior serious felony conviction. The court imposed and stayed punishment on count 2.⁴

DISCUSSION

Ramirez contends he is entitled to remand for resentencing pursuant to sections 667 and 1385, as amended by Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike a formerly mandatory five-year enhancement applicable to defendants who have suffered a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.) Under the previous versions of these statutes, the trial court was *required* to impose a five-year consecutive term for "[a]ny person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under

⁴ Ramirez was sentenced on August 17, 2018.

Section 667" (former § 1385, subd. (b)). (See *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160 [former section 1385 "remove[d] from the trial court all discretion to strike the prior felony convictions, thus rendering imposition of a five-year enhancement for each such prior conviction a certainty"].)

Ramirez contends, and the Attorney General concedes, the amendments apply here because Ramirez's conviction is not yet final. We agree. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [concluding the Legislature intended Senate Bill No. 1393 to "apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final" when the legislation went into effect].)

However, the Attorney General argues remand is not warranted here because the denial of Ramirez's *Romero* motion and the trial court's statements at sentencing demonstrate the trial court would not have dismissed the five-year enhancement even if it had discretion to do so at the time of sentencing.

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.' (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*)). Remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid.*)

The Attorney General contends remand is not required because the trial court declined to strike Ramirez's strike prior—predicated on the same offense as the prior

serious felony—and stated Ramirez was a "serious danger to society" due to the violent nature of the current offense. We disagree. At the time of sentencing, the trial court lacked discretion to strike the prior serious felony. As amended, section 1385 permits a trial court to strike an allegation "in the furtherance of justice." (§ 1385, subds. (a), (b).) The trial court did not state its opinion as to whether striking the prior serious felony would (or would not) be in the furtherance of justice. The trial court's denial of Ramirez's *Romero* motion to strike the prior strike was analyzed narrowly within the rubric of *Romero*, with the trial court concluding that, because both the prior strike and the present offense were serious felonies, the court could not conclude that Ramirez's case was "outside the spirit of the three strikes law." With respect to the five-year enhancement, the trial court's only comment was, "because this is a serious felony prior and it was a nickel prior that was alleged and found true, that is an additional five years." Furthermore, the trial court applied the middle, not upper, term. On this record, we cannot conclude that the trial court "clearly indicated when it originally sentenced the defendant that it would not in any event have stricken" Ramirez's prior serious felony enhancement. (*McDaniels, supra*, 22 Cal.App.5th at p. 425.) We therefore conclude that remand for resentencing is appropriate to allow the trial court to exercise its new discretion to strike the formerly mandatory five-year enhancement applicable to defendants who have suffered a prior serious felony conviction. We express no opinion as to how the trial court should exercise its discretion.

DISPOSITION

The sentence is vacated, and the matter is remanded to allow the trial court to determine whether to strike Ramirez's five-year enhancement under Penal Code sections 667, subdivision (a)(1) and 1385, as amended. In all other respects, the judgment is affirmed.

GUERRERO, J.

WE CONCUR:

IRION, Acting P. J.

DATO, J.